MALAYSIAN RESOURCES CORPORATION BHD

v.

JURANAS SDN BHD

HIGH COURT MALAYA, KUALA LUMPUR
VINCENT NG J
[ORIGINATING SUMMONS NO: D1-24-294-2001]
26 APRIL 2002

COMPANY LAW: *Winding-up - Injunction to restrain petition - Whether there were triable issues - Whether petition an abuse of process of court*

The defendant served a statutory notice of demand under s. 218 of the Companies Act 1965 on the plaintiff claiming money owed to it in respect of 'promoter fees' in procuring a certain project allegedly for the plaintiff. Consequently, the plaintiff applied for an injunction to restrain the defendant from filing a winding-up petition pursuant to the s. 218 notice. The crucial question for the court to consider was whether there were any triable issues which would entail a statutory winding-up court being converted into a common law trial court during the hearing of the winding-up petition; if there were, the petition for winding-up ought to be dismissed.

Held:

[1] The court had power in its equitable jurisdiction to restrain by injunction an abuse of process including the filing of a petition for winding-up a company. In this instance, numerous serious questions of fact and law had arisen in the uncertain circumstances of the matter herein; hence, the defendant would not succeed in an application to wind-up the plaintiff as this was a process of great impact and import where a strict onus of proof was expected. The defendant ought to commence a civil suit in order to enforce its alleged claim as only through a trial process, *via* examination of witnesses and production of primary evidence, could the events and circumstances of the case be explained. To resort to the winding-up procedure at first instance despite the triable issues raised by the plaintiff would amount to an abuse of the process of the court.
(pp 265 h & 271 c-e)

[Injunction allowed.]

Case(s) referred to:
B Liggett (Liverpool) Ltd v. Barclays Bank Ltd [1928] 1 KB 48 ***(foll)***
Bryanston Finance Ltd v. De Vries (No 2) [1976] 1 Ch 63 ***(refd)***
CGU Insurance Berhad v. Asean Security Paper Mills Sdn Bhd [2001] 1 CLJ 305 ***(refd)***

CGU Insurance Berhad v. Asean Security Paper Mills Sdn Bhd [2002] 2 CLJ 1 ***(foll)***
Charles Forte Investment Ltd v. Amanda [1963] 3 All ER 939 ***(refd)***
Commissioner of State Revenue of Victoria v. The Roy Morgan Research Centre Pty Ltd [1997] 24 ACSR 73 ***(refd)***
Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Berhad [1997] 3 CLJ 485 ***(refd)***
Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd [1964] 2 LR QB 480 ***(refd)***
In The Matter of the Corporations Law of Victoria and In The Matter of Brick Link Pty Ltd [1991] Vic Lexis 505 ***(refd)***
Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals [2001] 3 CLJ 248 ***(refd)***
Niger Merchants Co v. Capper [1877] 18 Ch D 557 ***(refd)***
NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd [1987] 1 MLJ 39 ***(refd)***
Re A Company (No 0013925 of 1991) [1992] BCLC 562 ***(refd)***
Re DR Electrical and Engineering Pty Ltd [1989] 15 ACLR 700 ***(refd)***
Re Five Oaks Construction Ltd [1968] 112 SJ 86 ***(refd)***
Re Imperial Guardian Life Assurance Society [1869] IX LR 447 ***(refd)***
Re NKM Holdings Sdn Bhd [1985] 2 MLJ 390 ***(refd)***
Re Signland Ltd [1982] 2 All ER 610 ***(refd)***
Royal British Bank v. Turquand [1856] 6 E & B 327 ***(refd)***
Tan Ah Tong v. Dato' Seri Dr Kuljit Singh [2002] 6 CLJ 484 ***(foll)***
Woodland Development Sdn Bhd v. Chartered Bank [1986] 1 MLJ 84 ***(refd)***

Legislation referred to:
Companies Act 1965, ss. 218, 221(2)(b), 226(2), (3)
Companies Winding-Up Rules 1972, rr. 24(1), 30(1)
Contracts Act 1950, ss. 30, 38
Limitation Act 1953, s. 2
Rules of the High Court 1980, O. 14, O. 92 r. 4

Companies (Winding-Up) Rules 1949 [UK], r. 28
Companies Code [NSW], s. 364(1)
Insolvency Rules 1986 [UK], r. 4.11
Rules of the Supreme Court [NSW], r. 18(4)
Rules of the Supreme Court [Vic], r. 8.10
Rules of the Supreme Court 1965 [UK], O. 18 r. 9(1)

Other source(s) referred to:
Walter CM Woon, *Company Law*, pp 56-58
Chitty on Contracts, vol 1, General Principles, 28th edn, pp 1097, 1437

For the plaintiff - N Navaratnam (WK Wong & Humaira Sulaiman); M/s Hisham, Sobri & Kadir
For the defendant - Ranjan Chandran (S Dhanaraj & Abdul Hakem Arabi); M/s Hakem Arabi & Assocs

Reported by Suresh Nathan

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JUDGMENT

Vincent Ng J:

The defendant *via* its solicitors had issued and served a statutory notice of demand dated 8 October 2001 under s. 218 of the Companies Act 1965 on the plaintiff claiming against the plaintiff an amount of RM6,000,000 allegedly owed to the defendant in respect of the 'promoter fees' in procuring the Kem Skudai Project allegedly for the plaintiff; that is, for introducing a contract for the construction of a military camp which work was being undertaken by one KCSB Konsortium Sdn Bhd. Consequently, the plaintiff applied for an injunction to restrain any commencement of winding-up proceedings by the defendant against the plaintiff. I granted the *ex parte* interim injunction and fixed the *inter partes* hearing for 19 November 2001.

In the present case the plaintiff has sought to move this court to restrain the defendant from filing a winding-up petition pursuant to the s. 218 notice. The adoption of this injunctive procedure is wholly legitimate in law and consistent with good sense, under the inherent jurisdiction of the court (which found expression and encapsulation in O. 92 r. 4 of the Rules of the High Court 1980 (RHC)), since a winding-up petition, if filed, entails mandatory gazettal and advertisement being carried out against the respondent; which may wrought significant commercial embarrassment and economic prejudice on the business operations of the respondent company. This would indeed be unjust if the petition is vexatious or an abuse of the process of the court (see *Charles Forte Investment Ltd v. Amanda* [1963] 3 All ER 939, [1964] Ch 240 and *Bryanston Finance Ltd v. De Vries (No 2)* [1976] 1 Ch 63). The traditional equitable principles including merits and balance of convenience considerations would apply in such applications (see *Niger Merchants Co v. Capper* [1877] 18 Ch D 557, 559).

A recourse to injunction relief against the filing of a winding-up petition is entirely appropriate as I am of the view that, due to deliberate use of the words "Every petition shall be advertised …" in r. 24 of the Companies Winding-Up Rules 1972 (the Rules) in contradistinction to the words in the dissimilar provision for advertisement in the English and Australian Rules, our legislature had intended gazettal and advertisement to be mandatory procedures concomitant with the petition itself which debars the courts from restraining it. In England, r. 4.11 of the Insolvency Rules 1986 (the precursor to Rule 28 of the Companies (Winding-Up) Rules 1949) provides that unless the court otherwise directs every petition is to be advertised in gazette not less than seven clear days after it has been served on the company and not less than seven clear days before the day fixed for the hearing (see Practice Direction (No. 1 of 1986); [1986] 1 WLR 286). This 'seven clear days after service on the company' rule is designed: (1) to give a company served with a winding-up petition the opportunity to discharge the debt in question, if it

is undisputed, before advertisement takes place, with all the necessarily potentially damaging consequences to the company; and (2) to enable the company, if it wishes to dispute the debt, to apply to restrain advertisement (see *Re Signland Ltd* [1982] 2 All ER 610, *Re A Company (No. 0013925 of 1991)* [1992] BCLC 562). Thus, if there is a court order forbidding advertisement of a petition, then its non-advertisement is not in itself a ground for dismissing the petition (*Re Five Oaks Construction Ltd* [1968] 112 SJ 86) (see also Applications to Wind Up Companies by Derek French B Sc - Blackstone Press Ltd).

The position concerning advertisement of a petition under Australian law is also similar to that obtaining in England. Rule 8.10 of the Rules of the Supreme Court for State of Victoria provides that a notice of motion for "winding-up shall be gazetted and advertised in Form 16 not earlier than fourteen days after the notice of motion is filed and not less than fourteen days before the hearing". Clearly, r. 8.10 is designed to ensure that the respondent company has ample time to apply to the court for an injunction which will be effective to prevent advertising and gazettal. The relevant rule of court in New South Wales (r. 18(4) of Part 80 of the rules) provides that "unless the court otherwise orders" notice of a winding-up petition application under s. 364(1) of the Companies (NSW) Code "be published once in the Government Gazette and once in a prescribed newspaper not earlier than three days after the date of service on the company of the summons claiming the order and not later than three days before the hearing" (see *Re DR Electrical and Engineering Pty Ltd* – 15 ACLR 700 – 6,20 September 1989 – Melbourne; *Commissioner of State Revenue of Victoria v. The Roy Morgan Research Centre Pty Ltd* 24 ACSR 73 30 May 1997 – Melbourne; *In The Matter of the Corporations Law of Victoria and In The Matter of Brick Link Pty Ltd* 4524 of 1991 – 1991 Vic Lexis 505, BC 9100684).

Clearly in so far as advertisement and gazettal are concerned English and Australian case authorities are inapplicable in our jurisdiction since advertisement and gazettal are mandatory procedures here, and are thus not amenable to injunctive reliefs. Indeed, in Australia, in the event an injunction is granted against advertisement and gazettal a typical consequential order that is made stipulates that "the applicant refrains from gazetting or advertising the winding-up application and instead notify members and creditors of the company that the application has been made and of their right to support or oppose it" (as in the *Roy Morgan* case *(supra)*). In England such injunction may be made, subject to certain alternative notification procedure being carried out by the petitioner, in which event a winding-up order may be made without advertisement or gazettal. Whereas, in Malaysia there has never been a case where a winding-up order has been made without advertisement or gazettal.

Historically, the nearest that our courts came to considering the question of an exemption of advertisement was way back in 1985 in the case of *Re NKM Holdings Sdn Bhd* [1985] 2 MLJ 390. In that case learned counsel Mr WSW Davidson, in anticipation of the court arriving at a finding of fact that the petition had not been duly advertised in the Government gazette, asked the court to invoke s. 221(2)(b) of the Companies Act and make orders dispensing the need to advertise (that is, the first advertisement) the petition. This resulted in the learned judge expressing the following views:

> I agree with Mr. Davidson that the need to gazette has indeed deteriorated into a mere formality and in the face of the existence of widely circulated daily newspapers has perhaps become an anachronism.

While confirming the exercise of the learned judge's discretion to dispense with advertisements in the gazette and newspapers of the **new date for hearing** of the petition, Seah SCJ who delivered the judgment of the Supreme Court in the appeal against the judgment of the High Court struck down the tentative though implied suggestion of George J (see *NKM Holdings Sdn Bhd v. Pan Malaysia Wood Bhd* [1987] 1 MLJ 39) with unusually strong language. This was how the mandatory nature of r. 24(1) of the Rules was expressed by the learned Supreme Court judge:

> With respect to the learned judge, we are unable to agree with his view. Advertisement of a winding-up petition in the Gazette is a statutory requirement [see Rule 24(a) of the Companies (Winding-up) Rules 1972] and deliberate non-compliance with this provision may result in adverse consequences. It must always be borne in mind that we are Judges, not legislators. The constitutional function of the courts is not only to interpret but also to enforce the laws enacted by Parliament. In enforcing the law we must be the first to obey it. It should be noted that the power of a Court to proceed in a particular course of administering justice, was one of substance and not merely of form. The duty of the Court, and its only duty, is to expound the language of the Act in accordance with the settled rules of construction. The Court has nothing to do with the policy of any Act which it may be called upon to interpret. That may be a matter for private judgment. It seems to us to be unwise as it is unprofitable to cavil at the policy of an Act of Parliament, or to pass a covert censure on the Legislature.

It is noteworthy that certain provisions of the Rules have already been construed to be mandatory in nature by our courts. The Court of Appeal in *Crocuses & Daffodils (M) Sdn Bhd v. Development & Commercial Bank Berhad* [1997] 3 CLJ 485 had unequivocally held r. 30(1) of the Rules – which required affidavits supporting the company's notice of intention to oppose the petition to be filed and a copy thereof served on the petitioner or his solicitors at least seven days before the hearing of the petition – to be mandatory in nature requiring strict compliance. Similarly, s. 226(3) of

the Companies Act has been construed by the Court of Appeal in *CGU Insurance Berhad v. Asean Security Paper Mills Sdn Bhd* [2001] 1 CLJ 305 to be a mandatory provision. Section 226(3) states:

> (3) When a winding up order has been made or a provisional liquidator has been appointed no action or proceeding shall be proceeded with or commenced against the company except:
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> (a) by leave of the Court; and
>
> (b) in accordance with such terms as the Court imposes.

Although this decision of the Court of Appeal was reversed by the Federal Court, in a judgment delivered on 8 February 2002, in *CGU Insurance Berhad v. Asean Security Paper Mills Sdn Bhd,* and two other appeals [2002] 2 CLJ 1 (*Asean Security Paper Mills*) yet the *ratio* of the Court of Appeal that s. 226(2) is a mandatory provision was not disturbed. The Federal Court – quite rightly, I must observe – through acceptance of plainly expressed language in s. 226(2), held that the words "against the company" must mean a proceeding where the liability is intended to be fastened on the company or its assets and not a proceeding which is in the nature of a defensive action. And, that a consequential application for security for costs in the process of setting aside a liability pinned on a defendant by the company does not fall within the meaning of the phrase "action or proceeding … proceeded with or commenced against the company" in s. 226(3) of the Companies Act. Notably, the following dicta of the Federal Court in *Asean Security Paper Mills (supra)* "Although we accept that an appeal or an application for security for costs can be construed as a proceeding *per se* …" clearly gave a stamp of approval by our apex court to the adoption of the wider and inclusionary import of the word 'proceeding'. This is as it should be, considering that under s. 2 of the Limitation Act 1953 'action' includes 'a suit or **any other proceeding of the court of law**'. And s. 3 of the Courts of Judicature Act 1964 defines 'proceeding' as 'any **procedure whatsoever of a civil** or criminal **nature**'. Thus, in my view, a bankruptcy action ought to be considered a proceeding of a civil nature in its broad sense (see the grounds of my decision dated 2 January 2002 in *Tan Ah Tong v Dato' Seri Dr Kuljit Singh* [2002] 6 CLJ 484).

The above discussions notwithstanding, it is settled law that the court has power in its equitable jurisdiction to restrain by injunction an abuse of process including the filing of a petition for winding-up a company. In considering this application it is important to bear in mind the settled principle that "a winding-up petition is not to be used as a machinery for trying a common law action" (see *Re Imperial Guardian Life Assurance*

Society [1869] IX LR 447). Thus, this court's duty in its determination of this originating summons is to carefully study all the affidavits filed by both sides including the affidavit in reply of Aris Massod affirmed on 5 November 2001 (defendant's 1st affidavit – encl. 10), and the further affidavit of Zubir bin Jaafar affirmed on 15 November 2001 (plaintiff's 2nd affidavit – encl. 8), and decide whether there is an undisputed acknowledgement of debt on the part of the plaintiff or whether from the circumstances averred in the affidavits it could be concluded that the amount claimed by the defendant is clearly due from the plaintiff. In my view, the crucial question the court should ask itself is: are there any triable issues which would entail a statutory winding-up court being converted into a common-law trial court during the hearing of the winding-up petition? And, if the answer is in the affirmative the petition should be dismissed.

The defendant sought to enforce payment of the amount of RM6,000,000 *via* winding-up proceedings against the plaintiff on the basis of a purported agreement between the defendant and the plaintiff pursuant to an alleged meeting on 9 January 1998 attended by Mr Lau Chee Kheong and Mr Cheong Kok Weng purportedly on behalf of the plaintiff, and Hj Aris Massod and Azmi Massod on behalf of the defendant.

To that end, the defendant exhibited (*via* exh. 'JSB5' of encl. 10 – at pp. 40 and 41), handwritten notes of the purported meeting on 9 January 1998, where an 'agreement' was allegedly concluded. The contention of the plaintiff in this regard, which I am more inclined to accept, is that pp. 40 and 41 of encl. 10 bear hand jottings which are at best ambiguous, incomprehensible and could hardly constitute terms of any oral or written agreement – a *fortiori* when a substantial amount of RM6,000,000 is allegedly involved. And, if at all an agreement was concluded at that alleged meeting on 9 January 1998, it raised more questions than answers as to the scope and terms of the purported agreement, namely as follows:

(a) What was the intention of the parties who attended the purported meeting?

(b) What was agreed, if at all, between the parties who attended the meeting?

(c) In what capacity did Mr Lau Chee Keong and Mr Cheong Kok Weng attend the meeting? It is pertinent to note the non-rebuttal of the plaintiff's assertion that the said Mr Lau and Mr Cheong were never on any occasion appointed the directors of the plaintiff company. And, that they were both, in fact, the directors of SPKT Binaan Sdn Bhd, a subsidiary of the plaintiff.

(d) On what basis would Mr Lau Chee Keong and Mr Cheong Kok Weng be in a position to bind the plaintiff company if they were never the directors of the plaintiff?

We have to be mindful of s. 30 of the Contracts Act 1950 which provides that:

> Agreements, the meaning of which is not certain or capable of being made certain, are void.

To establish the existence of the purported agreement dated 9 January 1998 and the liability of the plaintiff to pay the amount demanded the defendant further exhibited:

(a) its letter to the plaintiff dated 15 January 1998 (*vide* p. 39 of exh. 'JSB5' of encl. 10); and

(b) its letter to the plaintiff dated 15 February 1999 (*vide* p. 43 of exh. 'JSB6' of the same enclosure).

Re Exhibit 'JSB5'

The defendant contended that exh. 'JSB5' dated 15 January 1998 had the effect of confirming the terms of the purported agreement dated 9 January 1998 to the effect that the plaintiff was to pay RM6,000,000 to the defendant immediately upon procurement of the Kem Skudai Project in favour of the plaintiff. This calls for careful reading of the relevant paragraph of the defendant's letter which states as follows:

> We wish to extend our deepest appreciation at the confidence reposed in us to assist in the procurement of the project for Malaysian Resource Corporation Berhad and shall endeavour to the best of our abilities to achieve the same in the mutual interest of both companies. We reiterate that in accordance with the agreement dated 09.01.1998 and confirmation of the terms by Yang Bahagia Datuk, this letter shall be legally binding upon both companies upon successful procurement of the project.

The inference, *prima facie*, to be drawn from the contents of the letter of 15 January 1998 is that as at that date the defendant had yet to successfully procure the project for the benefit of plaintiff. Indeed, on the contrary, exh. 'JSB3' of encl. 10 clearly shows that as early as 10 July 1997, KCSB Konsortium Sdn Bhd had already extended a letter of award to the plaintiff in respect of works to be undertaken in the project. This raises serious questions as to the extent of the defendant's performance or contribution, if at all, to the alleged procurement of the said project.

It is beyond question that the meeting on 9 January 1998 was only attended by directors of SPKT Binaan Sdn Bhd. Thus, only a trial of the defendant's claim would determine whether the defendant's role was to secure the contract for the plaintiff or for its subsidiary SPKT Binaan Sdn Bhd, and on what terms. A trial is called for as the promisor in the letter would appear

to be SPKT Binaan Sdn Bhd at whose request on 24 May 1997 (by the defendant's own averment) the defendant undertook to procure a contract for the plaintiff or for SPKT Binaan Sdn Bhd.

On the principle of performance of contracts, s. 38 of the Contracts Act 1950 provides as follows:

> 38. Obligation of parties to contracts
>
> (1) The parties to a contract must either perform, or offer to perform, their respective promises, unless the performance is dispensed with or excused under this Act, or of any other law.

And, in *Chitty on Contracts, Volume 1, General Principles* (28th edn Chapter 22 at p. 1097) the learned author observed that:

> The general rule is that a party to a contract must perform exactly what he undertook to do. When an issue arises as to whether performance is sufficient, the court must first construe the contract in order to ascertain the nature of the obligation (which is a question of law); the next question is to see whether the actual performance measures up to that obligation (which is a question of "mixed fact and law" in that the court decides whether the facts of the actual performance satisfy the standard prescribed by the contractual provisions defining the obligation). This means that although an appellate court or a court reviewing that decision of an arbitrator, may not normally question a finding of pure fact by the lower court or arbitrator, it may review the construction of the contract and draw its own conclusion as to whether or not the facts amount to performance.

Thus, the onus is on the defendant to prove in the trial of its claim the nature and extent of its services rendered and the performance which purportedly resulted in procurement of the project for the plaintiff and, consequently, its entitlement to payment of promoter fees.

Re Exhibit 'JSB6'

I have taken due consideration of the following words appearing in exh. 'JSB6' "We confirm the above amount owing for Juranas Sdn Bhd by MRCB." The defendant claims that the said letters amounted to an admission on the part of the plaintiff to pay the amount of RM6,000,000; given that they were acknowledged and signed by one Masni Sharil bin Abu Bakar. At this juncture, a pertinent and pivotal point to note is the plaintiff's assertion that Masni Sharil was never on any occasion appointed a director of the plaintiff, and that the said Masni Sharil was not, at any time, even an employee of the plaintiff – he was merely an employee of Teras Cemara Sdn Bhd, a subsidiary company of the plaintiff. Consequently, in my judgment, the question of whether there is a legally sufficient acknowledgement or admission of debt can only be adequately answered by

having regard to the identity and authority of the party who allegedly made the acknowledgement.

In the discussion in *Chitty on Contracts, Volume 1, General Principles*, 28th Edn – at p. 1437, the question of who are the parties to the acknowledgement becomes an important consideration on whether it constitutes a legally enforceable acknowledgement.

> The acknowledgement or payment may be made by the agent of the person liable and must be made to the person or to the agent of the person whose claim is being acknowledged, or in respect of whose claim the payment is being made. An acknowledgement or part payment made by a stranger who is not an agent of the debtor is of no effect.

There is great force in the plaintiff's contention that if Masni Sharil is not shown to be either an employee or an agent with authority to bind the plaintiff under the test in *Freeman & Lockyer v. Buckhurst Park Properties (Mangal) Ltd* [1964] 2 LR QB 480 at 506, the plaintiff ought not to be held liable especially in a matter of such substantial nature. It was further submitted that in commercial and company practice, even directors of companies have not ventured so far as to bind the company in substantial transactions without the express authority accorded *via* the board of directors or members' resolution. And that, despite several references made to one Dato' Khalid bin Haji Ahmad in the defendant's letters, for the purpose of showing that the said Dato' Khalid had agreed to its claims, on the facts, there was no concrete evidence that tends to prove this fact. This is a matter of considerable dispute by the plaintiff, as nowhere could there be found in the defendant's exhibits, any acknowledgement by Dato' Khalid bin Haji Ahmad of the defendant's claim.

The plaintiff further contended that if the alleged representations of a single director as to the agent's authority was at all true, it did not have the effect of binding the company, if the said director did not have actual authority himself to make such representations. Here I must observe that it is for this reason that unequivocal resolutions by the board of directors approving the entering into of any substantial transaction are normally required.

This was succinctly explained in *Freeman & Lockyer* (*supra* – at pp. 504-505):

> The second characteristic of a corporation, namely, that unlike a natural person it can only make a representation through an agent, has the consequence that in order to create an estoppel between the corporation and the contractor, the representation as to the authority of the agent which creates his 'apparent' authority must be made by some person or persons who have 'actual' authority from the corporation to make the representation.

> Such 'actual' authority may be conferred by the constitution of the corporation itself, as, for example, in the case of a company, upon the board of directors, or it may be conferred by those who, under its constitution, have the powers of management upon some other person to whom the constitution permits them to delegate authority to make representations of this kind. It follows that where the agent upon whose 'apparent' authority the contractor relies has no 'actual' authority from the corporation to enter into a particular contract with the contractor on behalf of the corporation, the contractor cannot rely upon the agent's own representation as to his 'actual' authority. He can rely only upon a representation by a person or persons who have 'actual' authority to manage or conduct that part of the business of the corporation to which the contract relates.

I find no evidence adduced in the defendant's affidavits that Dato' Khalid bin Ahmad or Masni Sharil were held out by the plaintiff as having any such actual or ostensible authority. Thus, the question to resolve is: was there anything done by the plaintiff from which authority the 'agent' could be inferred. Further, if the person who made the representation did not have actual authority himself to make such a representation, the representation will not bind the company.

Indoor Management Rule

The defendant further sought to rely on the "indoor management rule" as expounded in *Royal British Bank v. Turquand* [1856] 6 E & B 327 (court of Exchequer Chamber), being that the defendant is entitled to assume that the acts of internal management of the plaintiff are regular, when dealing with the supposed key personnel of the plaintiff. The plaintiff, however, contended that the "indoor management rule" does not apply in a blanket fashion and has no application to the matter herein. And, that indoor management rule, if at all applicable, should be applied in conjunction with the rules on apparent or ostensible authority. According to the learned author Walter CM Woon in his opus *Company Law* (at pp. 56-58 – published by Longman) there are limitations upon a party's competency to rely upon the indoor management rule. Firstly, if the contracting party knows or should know of the agent's lack of authority he cannot rely on this rule. Secondly, if there are circumstances that would put the contracting party on inquiry, the indoor management rule will not apply (*B Liggett (Liverpool) Ltd v. Barclays Bank Ltd* [1928] 1 KB 48). Thus, if the circumstances are such that a reasonable man would be suspicious of the agent's authority, the contracting party must make reasonable inquiries. And, if such inquiries would have revealed the agent's lack of authority, the contracting party cannot rely on the indoor management rule to assist him. Thirdly, if an examination of the company's memorandum or articles of association would have made it plain that the agent's authority was limited, the contractor may not depend on the indoor management rule. Also, a party cannot plead that

he has not actually read the memorandum and articles, since everyone is deemed to have constructive notice of those documents (see *Woodland Development Sdn Bhd v. Chartered Bank* [1986] 1 MLJ 84, 88-89).

Clearly, in my view, the fact that the personalities purportedly involved in the alleged agreement, namely, Mr Lau Chee Keong and Mr Cheong Kok Weng, and in the alleged acknowledgement of the defendant's claim, namely, Encik Masni bin Sharil, were not directors of the plaintiff company – and, with the exception of Mr Cheong Kok Weng, were not even employees of the plaintiff – are circumstances that would put the defendant on inquiry.

In conclusion, I found that numerous serious questions of fact and law have arisen in the uncertain circumstances of the matter herein. Indeed, I could not see how the defendant could succeed under an O. 14 summary judgment procedure, if sought, in the impending action, let alone in an application to wind-up the plaintiff, being a process of great impact and import where a stricter onus of proof is expected.

My conclusion is that a civil suit ought to be commenced by the defendant in order to enforce its alleged claims. It is only through the trial process *via* examination of witness and production of primary evidence that will throw some light on what actually transpired at the alleged meeting on 9 January 1998 and the ensuing events and circumstances thereafter. To resort to the winding-up procedure at first instance despite the triable issues raised by the plaintiff would amount to an abuse of the process of the court.

In the event, the *inter partes* injunction sought by the plaintiff in encl. 1 was allowed with costs.

In Postscript

I am *ad idem* with the *obiter* views of the Court of Appeal in *Maril-Rionebel (M) Sdn Bhd & Anor v. Perdana Merchant Bankers Bhd & Other Appeals* [2001] 3 CLJ 248 which was expressed as follows:

> … the unhealthy trend is, upon being served with a petition, instead of defending the petition proper at the hearing of the petition, the respondent makes all kinds of interlocutory applications that would invariably stall the hearing of the petition proper.

In my considered opinion, as s. 218 of the Act has prescribed a substantial period of 21 days grace period to enable the company to apply for an injunction against the filing of a winding-up petition, the intention of our legislature is that once a petition is filed the question of solvency of a company is to be determined at the ultimate hearing of the winding-up application, and the fact that there is a matter of dispute ought not to give rise to a ground for the premature striking out or stay of a petition *in limine*. An application

under the inherent jurisdiction of the court for stay of a petition *in limine* as an abuse of process or to strike out the petition under the English O. 18 r. 9(1) has long been recognised by the English Courts as a valid procedure in that jurisdiction (see *Bryanston Finance (supra)* at p. 79-D). However, it is my view that O. 18 r. 19, not unlike O. 14 of our RHC are provisions that are designed more specifically for civil suits than petitions, due to the very short 'gestation period' of the latter procedure.

Be that as it may, considering that a stay and striking-out application and the petition itself clearly involve the same subject matter between the same parties, and in which substantially the same issues called for determination, all such applications could, in my view, be stood over and heard together or concurrently with the petition. This would prevent the mischief of multiplicity involving several hearings, judgments, appeals and bites at the proverbial cherry and considerable stalling of the disposal of the petition proper consequent upon the appeal process on the applications. When heard together, in the event the petition is dismissed both the stay and striking-out applications would be struck out. But, if the petition is allowed the applications would follow the event, and the three enclosures taken out of the court docket, with the need to write only one judgment on one appeal, if any. Most importantly, the petition itself would not remain suspended in the court docket – perhaps for years.